

Sentencing Hearing

November 16, 2022

USA,

v.

YANJUN XU,

Case No. 1:18-cr-00043-TSB-1



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1 US DISTRICT COURT
2 SOUTHERN DISTRICT OF OHIO
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5 _____)
6 USA,)
7 Plaintiff,) Case No.
8 vs.) 1:18-cr-00043-TSB-1
9 YANJUN XU,)
10 Defendant.)
11 _____)

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15 Before: HONORABLE TIMOTHY S. BLACK
16 Date and Time: Wednesday, November 16, 2022
10:30 A.M.
17 Place: Potter Stewart
United States Courthouse
18 100 East Fifth Street
Courtroom 1
19 Cincinnati, Ohio 45202
20 Reporter: Kathy S. Simpson, RPR
Notary Public - State of Ohio
21 Interpreters: Mae Harmon
Robin Murphy
22 (via videoconference)
23
24
25

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21 Also present:

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23 U.S. Department of Justice
24 Bradley Hull, Special Agent
25 F.B.I.

24

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1 P-R-O-C-E-E-D-I-N-G-S

2 MS. SANTORO: All rise.

3 THE COURT: Thank you. Please be
4 seated.

5 Good morning. We are here in the
6 open courtroom on the record on the
7 criminal docket in the case of United
8 States versus Xu, case number 1:18-cr-43.

9 We're here for sentencing. I would
10 like to begin with the attorneys entering
11 their appearances for record.

12 Who will appear as the attorneys for
13 the United States of America?

14 MS. GLATFELTER: Good morning, your
15 Honor, Emily Glatfelter. I'm also joined
16 at counsel table with Matt McKenzie from
17 the Department of Justice, Jackie Prim
18 from the Department of Justice, and
19 Bradley Hull from the FBI. My
20 co-counsel, Tim Mangan, unfortunately
21 can't be here. He is in trial in front
22 of Judge Barrett.

23 THE COURT: That is unfortunate.
24 I'd ask the Defense to enter their
25 appearances.

1 MR. MIEDEL: Good morning, your
2 Honor, Florian Miedel, Jeanne Cors, and
3 Sanna-Rae Taylor for Mr. Xu. Also at
4 counsel table with us is Mae Harmon, who
5 is the interpreter for the Defense.

6 THE COURT: Good morning, welcome
7 back. Mr. Xu is present and seated to
8 counsel's left in the custody of the U.S.
9 Marshal, correct?

10 MR. MIEDEL: That's correct.

11 THE COURT: Good morning, sir.

12 THE DEFENDANT: Good morning.

13 INTERPRETER MURPHY: Good morning.

14 THE COURT: Good morning. This is
15 Judge Black. I'm going to run through
16 this. Ms. Mae Harmon is here. Good
17 morning to her. She is the Chinese
18 language interpreter between the
19 Defendant and his attorneys; is that
20 right?

21 INTERPRETER HARMON: Yes. That's
22 correct.

23 THE COURT: Very well.

24 I don't believe I actually need you
25 under oath, but it can't hurt. I'm going

1 to administer the oath that you correctly
2 and accurately interpret these
3 proceedings.

4 Would you raise your right hand?

5 MAE HARMON

6 an interpreter herein, was duly sworn to correctly
7 and accurately interpret the following proceedings:

8 THE COURT: Thank you.

9 We also have Ms. Robin Murphy
10 participating remotely. Ms. Murphy is
11 the interpreter provided by the Court for
12 Mr. Xu. He has two, his own and the
13 Court's. She's linked to our courtroom
14 audio and is also communicating with the
15 Defendant by way of a headset.

16 Ms. Murphy, this is Judge Black, are
17 you able to hear me?

18 INTERPRETER MURPHY: Yes, your
19 Honor.

20 THE COURT: Good morning. I would
21 like you to take the oath to correctly
22 interpret these proceedings as well.

23 Would you raise your right hand?
24 It's not necessary, but it's historic.
25 The oath I impose is absolute.

1 ROBIN MURPHY

2 an interpreter herein, was duly sworn to correctly
3 and accurately interpret the following proceedings:

4 THE COURT: Thank you.

5 INTERPRETER MURPHY: Thank you.

6 THE COURT: Now, Ms. Murphy, you can
7 go ahead and mute yourself. If at any
8 point you have trouble understanding or
9 just need a break, please don't hesitate
10 to get our attention. You can either
11 unmute yourself and speak right up or
12 just wave your -- communicate with my
13 staff. You may be able to IM them as
14 well. Just unmute yourself and tell me
15 what you need. The Court and the
16 community appreciate your work.

17 INTERPRETER MURPHY: I will.

18 THE COURT: Very well. We're here
19 for sentencing. It's going to take me a
20 few minutes to establish the record for
21 purposes of sentencing. I promise I'll
22 lift my eyes from the paperwork and
23 listen carefully to the statements from
24 the lawyers, any statement the Defendant
25 wishes to make, if he wishes to make one.

1 Bear with me.

2 MR. MIEDEL: Your Honor.

3 THE COURT: Yes.

4 MR. MIEDEL: Sorry to interrupt. I
5 have two brief housekeeping matters.

6 THE COURT: Very well.

7 MR. MIEDEL: The first is, we
8 request that Mr. Xu's arms be unshackled
9 as they were previously. I checked with
10 the marshals. They said it would be up
11 to you, your Honor, just because he may
12 need to write notes or communicate with
13 us. That's number 1.

14 Number 2 is at the appropriate time
15 Mr. Xu will want to make a statement. He
16 has worked on that statement with
17 Ms. Harmon and the translation, and so we
18 think it would be best or easier if she
19 were the one to read the English
20 translation into the record as opposed to
21 forcing the Court interpreter to listen
22 to the statement and interpret it
23 realtime.

24 THE COURT: Is the Government
25 amenable to that approach?

1 MS. GLATFELTER: No objection, your
2 Honor.

3 THE COURT: No objection.

4 As to the marshal, I thought you
5 were in charge of security? I would have
6 told them it's up to you. If it's up to
7 me, I think you should assist the
8 Defendant with his ability by letting his
9 arm shackles go and his wrists so he can
10 communicate with his lawyers in writing.

11 MR. MIEDEL: Thank you, your Honor.

12 THE COURT: Very well.

13 All right. We're ready to proceed.
14 It's going to take a few minutes. Bear
15 with me. Some of it may sound like
16 legalese, but this part is straight
17 forward.

18 Following a lengthy jury trial, the
19 Defendant stands before the Court today
20 having been convicted of four felony
21 counts; including Count 1, conspiracy to
22 commit economic espionage, a Class C
23 federal felony, providing a maximum
24 possible sentence of up to 15 years
25 imprisonment, up to three years of

1 supervised release, and a fine of up to
2 half a million dollars.

3 Count 2, which he was convicted, was
4 conspiracy to commit trade secret theft,
5 also a Class C federal felony, providing,
6 however, a maximum possible sentence of
7 up to ten years imprisonment, up to three
8 years of supervised release, and a fine
9 of up to a quarter of a million dollars.

10 He was convicted of Count 3, attempt
11 to commit economic espionage, a Class C
12 felony, providing a maximum possible
13 sentence of up to 15 years in prison, up
14 to three years of supervised release, and
15 a fine of up to a half a million dollars.

16 He was convicted of Count 4, attempt
17 to commit trade secret theft, a Class C
18 felony, providing a maximum possible
19 sentence of up to ten years in prison, up
20 to three years of supervised release, and
21 a fine of up to 250,000.

22 Each of the above counts carries a
23 mandatory hundred dollar special
24 assessment.

25 I should note for the record that I

1 received sentencing memoranda from the
2 lawyers from the both sides, they were
3 helpful and professional and well done.

4 And I also have two letters in
5 support of Mr. Xu, which I have read
6 carefully.

7 Additionally, I previously ordered,
8 as I do in all case, the preparation of
9 and I have since received a thorough
10 written presentence investigation report.
11 The Defendant has raised a number of
12 objections to the presentence report.
13 The most substantial of which was its
14 objection to the loss amount computation.

15 At the parties' request, I agreed to
16 conduct on the record a presentencing
17 evidentiary hearing to determine the loss
18 amount, after which I also received the
19 parties' written memoranda in support of
20 their respective positions.

21 On November 5th, I resolved the loss
22 objection by way of written order filed
23 on the docket at Document 208.

24 The Defendant, nonetheless, has five
25 additional objections to the presentence

1 report which I will address in due
2 course.

3 For the time being, I simply want to
4 establish on the record that it's
5 competent, it's true, and both sides have
6 seen the presentence report and that
7 there are no objections beyond those
8 reflected in the presentence report.

9 So has the Government in the first
10 instance seen the presentence
11 investigation report and are there no
12 objections?

13 MS. GLATFELTER: There are no
14 objections from the Government.

15 THE COURT: And you've seen it?

16 MS. GLATFELTER: Yes, your Honor.

17 THE COURT: Very well.

18 And, Counsel, have you and your
19 client received and reviewed the
20 presentence report and are there any
21 objections other than the ones reflected
22 in the presentence report?

23 MR. MIEDEL: Your Honor, we have
24 seen and reviewed the presentence report.
25 It was translated for Mr. Xu. He has

1 seen it. We have no further objections
2 beyond the ones we already made.

3 THE COURT: Very well.

4 I'm going to ask Mr. Xu directly.
5 You've seen the presentence investigation
6 report I have before me and you talked to
7 your lawyer about it? Yes or no?

8 THE DEFENDANT: Yes.

9 THE COURT: Thank you.

10 In terms of factual findings for
11 purposes of sentence, which I need to
12 establish, 18 U.S. Code 3661 states that,
13 quote, No limitation shall be placed on
14 the information concerning the
15 background, character, and conduct of a
16 person convicted of an offense which a
17 court of the United States may receive
18 and consider for the purpose of imposing
19 an appropriate sentence.

20 In that regard, and absent an
21 objection from the parties, I intend to
22 rely upon number one, the evidence
23 presented at trial, and upon which the
24 jury relied in reaching its verdict; two,
25 the evidence presented for purpose of

1 sentencing; and three, typically I would
2 also adopt as the Court's own, the facts
3 set forth in the PSR, absent any facts to
4 which there is a meritorious dispute.

5 Is there any objection to that
6 overall approach by the Government?

7 MS. GLATFELTER: No, your Honor.
8 Thank you.

9 THE COURT: By the Defense?

10 MR. MIEDEL: No, your Honor.

11 THE COURT: Very well. The Court
12 adopts the facts presented in the
13 presentence report as its own and will
14 rely on the evidence presented at the
15 jury trial, which I was present at for
16 every moment, upon which the jury relied
17 in reaching its verdicts.

18 So those are the factual findings
19 for purpose of sentencing as required for
20 the record.

21 Today it's this Judge's
22 responsibility to fashion a sentence that
23 is sufficient, but not greater than
24 necessary, to accomplish the purposes of
25 sentencing.

1 The purposes of sentencing include
2 to reflect the seriousness of the
3 offense, to promote respect for the law,
4 to provide just punishment for the
5 offense, to provide adequate deterrence
6 to criminal conduct, to stop it, to
7 protect the public from further crimes
8 from this Defendant, and to provide
9 appropriate correctional and
10 rehabilitative treatment in the most
11 effective manner.

12 I'm required to consider a number of
13 factors in reaching the determination.
14 I'm required to consider the nature and
15 circumstance of the offense, the history
16 and characteristics of the Defendant, the
17 kinds of sentences available, the
18 sentencing range proposed by the
19 non-binding sentencing guidelines.

20 I'm specifically required to avoid
21 unwarranted, inappropriate sentencing
22 differences or disparities among
23 defendants with similar records who have
24 been found guilty of similar conduct.

25 I also need to consider the need to

1 pay the restitution to the victims, when
2 applicable; essentially, the nature of
3 the offense, the history and character of
4 the Defendant, the needs of the public
5 and any victims of the crimes.

6 One of the factors I just listed is
7 what the sentencing guidelines recommend.
8 I need to establish on the record what
9 the correct guideline calculation is as
10 to this Defendant. The guidelines do not
11 bind me, but I need to start my analysis
12 there on the recommendation.

13 If I deviate, I need to be able to
14 articulate appropriate reasons for that
15 decision. I know the Defense has raised
16 a number of objections to the PSR, some
17 of which relate to the guideline
18 computation.

19 So I'm going to start by
20 articulating my current computation,
21 which is the same computation in the
22 presentence report with the amended loss
23 amount, pursuant to the Court's written
24 order. I will then address the
25 objections, make any modifications if

1 needed.

2 The sentence guidelines are an
3 effort by Congress to bring consistency
4 in sentences by federal judges across the
5 country. It's basically a math score.
6 It's a graph with two bars. The vertical
7 bar is the nature of the offense; the
8 more serious, the higher.

9 The horizontal bar is prior criminal
10 convictions, if any. The more of them,
11 the further out on the graph.

12 The points meet in a box which
13 recommend the sentence. I am not bound
14 by it. I do not need to follow it, but I
15 have to start there.

16 Here's my guideline calculation. He
17 is convicted of four separate counts,
18 including conspiracy and attempt to
19 commit economic espionage, Counts 1 and
20 3; conspiracy and attempt to commit trade
21 secret theft, Counts 2 and 4. When a
22 defendant is convicted of more than one
23 count, the Court calculates the
24 guidelines by grouping any counts that
25 are closely related, and then combining

1 the individually scored groups in order
2 to determine the total combined offense
3 level.

4 Here, because the offense levels for
5 all four counts are determined based on
6 total amount of harm or loss, all four
7 offenses are grouped for the purpose of
8 computation.

9 The calculation for the group is as
10 follows: Basic level is 6. 22 levels
11 are added because the loss amount was at
12 least 25 million but not more than
13 65 million.

14 The Defendant objected to the loss
15 amount. I already resolved his objection
16 and determined and stated in the written
17 order that the loss amount is just over
18 \$50 million. It's within 25 to
19 65 million. So 22 levels are added.

20 Two levels are added because the
21 offense involves sophisticated means.
22 Four levels added because the offense
23 involved misappropriation of a trade
24 secret. And Mr. Xu knew or intended that
25 the offense benefit a foreign government.

1 Three levels are added because Mr. Xu was
2 a manager and a supervisor of criminal
3 activity and it either involved at least
4 five participants or was, quote,
5 otherwise extensive, end quote.

6 The Defendant objects to this
7 add-on. This add-on leaves us with a
8 total offense level of 37. I want to
9 address additional objections, remaining
10 objections before proceeding further.
11 Pursuant to Rule 32 of the Federal Rules
12 of Criminal Procedure, at the time of
13 sentencing the Court, the Judge, must
14 resolve any disputed portion of the
15 presentence report unless the Court
16 determines the ruling is unnecessary,
17 either because the matter will not be
18 considered or will not affect sentencing;
19 moreover, quote, To create a factual
20 dispute, a Defendant, single quote, must
21 produce some evidence to cause the
22 reliability or correctness of the alleged
23 fact into question, single quote, the
24 burden of production that requires,
25 single quote, more than a bare denial,

1 end quote. United States versus Cover,
2 6th Circuit 2015, 800 F.3d, 275 at 278.

3 Here, Mr. Xu has filed remaining
4 objections to the PSR. Of those
5 objections, on objection 14 -- one
6 objection, objection 14, this is a
7 three-level enhancement for his role in
8 the offense.

9 The remaining four, specifically
10 objections 2, 4, 11, and 12 are directed
11 at the presentence report's description
12 of the offense conduct.

13 To be clear, the presentence
14 report's primary function is to assist
15 me, the sentencing judge. And the
16 presentence report's offense conduct
17 summary is helpful in cases that are
18 resolved pretrial because I haven't seen
19 the evidence in those cases at trial.

20 But this Defendant's case went to
21 trial. I presided over it. I saw and
22 heard all the evidence presented. So
23 today, I have no interest in rehashing
24 the evidence nor do I have any interest
25 in arguing over semantics and how

1 sentence may be read or construed because
2 I'm the one that's reading the
3 presentence report and I know what it
4 presents and I'm not going to be misled
5 or confused.

6 Objection 2, 4, 11, and 12, the
7 presentence report description of the
8 offense conduct is erroneous because the
9 Government allegedly didn't produce any
10 evidence to support it. I disagree.

11 The Defendant's objection is a bare
12 denial and are focused on the summary of
13 the evidence I saw and heard firsthand.
14 So those objections are overruled.

15 As to objection 14, Defendant
16 objects to the three-level enhancement
17 for being a manager or supervisor. The
18 Defense argues that the Government's
19 theory at trial focused on the
20 Defendant's role in a high-level
21 conspiracy perpetrated by the Chinese
22 government and that there's no evidence
23 the Defendant had any role in planning or
24 making policy.

25 In short, the Defense argues that

1 the evidence reflects nothing more than
2 the Defendant being a simple cog in the
3 wheel. I disagree.

4 To be clear, the Defendant's not
5 receiving the higher four-level
6 enhancement for being a leader or
7 organizer. There were, indeed, plenty of
8 people above him, but he was the deputy
9 director of his bureau.

10 Let me get this from the prior
11 order. Defendant is a citizen of the
12 People's Republic of China and a deputy
13 division director of the Sixth Bureau of
14 a specific Providence of the Ministry of
15 State Security, the MSS.

16 The MSS is China's intelligence and
17 security agency responsible for
18 counterintelligence, foreign
19 intelligence, and political security and
20 has broad powers in China to conduct
21 espionage both domestically and abroad.

22 On behalf of the MSS, this
23 Defendant, and other MSS officers,
24 engaged in recruiting experts from
25 leading aviation companies and then

1 through the use of alias and
2 misrepresentations bringing the experts
3 to China in order to obtain from them
4 technical information belonging to the
5 experts' employees (sic), i.e. the
6 aviation companies.

7 So he's the deputy director of his
8 bureau. Mere labels are not controlling
9 under the guidelines. The Defendant's
10 title was not, however, a mere label. An
11 official ranking in a government position
12 is different from someone who calls
13 themselves a king pin among dealers.

14 Defendant did have decision-making
15 authority in selecting who would be
16 targeted, how they would be approached.
17 He instructed others within the
18 conspiracy. He reported to higher-ups,
19 coordinated activities within his bureau
20 or office. The evidence does not support
21 a finding that the Defendant was a
22 leader, but he was certainly a manager
23 within the smaller subset of the
24 extensive organization, which I believe
25 requires five involved people, so the

1 objection is overruled.

2 That leaves us with where he started
3 with a total offense level of 37 on the
4 vertical bar. He has no criminal
5 history. He receives zero criminal
6 points leaves a criminal history category
7 1 out of 6.

8 Anyone in America with a total
9 offense level of 37 and a criminal
10 history category of 1, guidelines
11 recommend a sentence of 210 to
12 262 months, 17 and a half to almost 22
13 years.

14 Are there further objections or
15 argument as to the Court's computation of
16 the guideline calculation and its ruling
17 on the objections from the Government?

18 MS. GLATFELTER: No, your Honor.
19 Thank you.

20 THE COURT: From the Defense?

21 MR. MIEDEL: No further objections.

22 THE COURT: Very well.

23 We established the record for
24 purposes of sentencing.

25 I'm prepared to listen carefully to

1 the statements of lawyers and any
2 statement the Defendant wishes to make,
3 and I would like to hear from the
4 Government first so I can clear the decks
5 and focus fully on the Defense at that
6 time. Then I will hear from Defendant's
7 attorneys. And if Mr. Xu wishes to make
8 a statement, his interpreter may read the
9 English version of his statement if he
10 feels unable to do it himself.

11 So does the Government wish to be
12 heard further as to sentencing beyond the
13 sentencing memoranda?

14 MS. GLATFELTER: Yes, briefly, your
15 Honor. May I approach and use the
16 podium, please?

17 THE COURT: Yes, you may.

18 MS. GLATFELTER: It's just easier to
19 talk to you than at my table.

20 THE COURT: I'm delighted. You have
21 two microphones and I plan to listen
22 carefully.

23 MS. GLATFELTER: Thank you.

24 Your Honor, as you mentioned, we
25 submitted a detailed sentencing

1 memorandum. It's 30 pages where we walk
2 through all the 3553(a) factors and their
3 application in the case. I know the
4 Court has read that carefully from what
5 you said this morning, and the Court
6 presided over the three-week trial here
7 and is intimately familiar with the
8 evidence from that trial and also from
9 all the motion practice the Court has
10 endured, so I won't rehash those
11 arguments that we made in the memo, but I
12 do want to highlight a few points that
13 may be helpful for the Court today.

14 So the starting place I think at
15 this sentencing is the breadth of the
16 economic espionage in this case, the
17 scope of the economic espionage the
18 Defendant himself -- the Defendant
19 himself engaged in is what sets this case
20 apart from every other case in the
21 country, every case before it, and
22 probably every other case after this
23 case.

24 The jury convicted the Defendant of
25 conspiring to commit economic espionage.

1 This wasn't a single episode. This
2 wasn't two episodes. This was a course
3 of conduct over a five-year conspiracy.

4 And during this time frame, the
5 Defendant furthered this conspiracy every
6 single day. He was not your average
7 intelligence officer. He was a leader.
8 He was a manager in the MSS. He was the
9 deputy division director and his
10 specialty was recruiting and using
11 co-optees to gain information from the
12 leading aviation companies in the world.

13 Just a few words about the evidence
14 at trial. We presented evidence about
15 the Defendant's own conduct, his own
16 conduct towards the world's leading
17 aerospace and aviation companies
18 including Safran, Boeing, Honeywell, and
19 General Electric.

20 We presented evidence about his MO,
21 how he would entice engineers to China
22 who thought they were going to China to
23 present information at a university to
24 students when in reality they were
25 presenting to government officials trying

1 to steal foreign technology and replicate
2 it.

3 The Government also presented
4 evidence of how he surreptitiously
5 attempted to gain secret information from
6 unsuspecting guests in China while they
7 were being entertained away from their
8 hotel room, and how he orchestrated and
9 perpetrated an attack on Safran using its
10 own co-opted employees to help plant
11 mal-ware.

12 And how all of the Defendant's
13 conduct was emblematic of the recruiting
14 cycle used time and time again by spies
15 across the world.

16 Now, I won't belabor the evidence in
17 this case, instead what I want to do is
18 focus on a few of the Defendant's
19 arguments in the Defendant's memo of the
20 3553 factor, because we haven't had a
21 chance to respond to those.

22 So I just went over the nature and
23 the circumstances of the offense here,
24 but in terms of the history and
25 characteristics of the Defendant. The

1 Defendant did submit two translated
2 letters from his father and his wife.
3 They highlight the circumstances and what
4 this case has meant for them. And the
5 unfortunate reality of criminal offenses
6 is that they not only wreak havoc on the
7 lives of the victims, but the Defendant's
8 family often bears the tragic
9 consequences of their action and the
10 choices that the Defendant has made. And
11 that is a fact and usually part of each
12 sentencing that the Court conducts in
13 this courtroom.

14 The Defendant's memorandum also
15 relied on these two letters in discussing
16 the Defendant's characteristics or
17 character aside from his work with the
18 MSS. In particular, one I would like to
19 focus on is, the Defendant's sentencing
20 memo discussed his continuing education
21 and the fact that he was pursuing degrees
22 separate and apart from his job.

23 A piece of evidence that the Court
24 has in front of it or that it heard
25 during trial and that no one has really

1 discussed in this context, in fact, the
2 Defendant's history and characteristics
3 is the recording that the Defendant made
4 of a session with his tutor. This
5 recording, as a reminder, was recovered
6 from the Defendant Xu's iCloud. It was
7 translated. It was transcribed. And it
8 was introduced into evidence in Exhibit
9 31, 31A was the recording and 31B was the
10 translation.

11 And we introduced this recording at
12 trial to show in Xu's own words --
13 Defendant Xu's own words what he said
14 about his job, and to show that he was
15 working for the MSS and what his job
16 duties were.

17 But one of the broader contexts of
18 this recording shows another side of him
19 separate and apart from his work with the
20 MSS. He was getting tutored, quote,
21 unquote, for his -- I think his master's
22 degree, his engineering degree. But he
23 wasn't getting tutored on the subject
24 matter of the class, he was getting
25 tutored on the answers to the exam

1 questions.

2 His tutor was a professor from the
3 college, and during the session Xu tried
4 to reassure him that no one would find
5 out about their session.

6 Defendant Xu was cheating. He was
7 engaged in deception in an everyday and
8 ordinary experience in his life. And
9 this wasn't a one-time deal. He was
10 counting on cheating to get through all
11 the other classes for the degree.

12 When the tutor, the professor asked
13 him how he planned to master a complex
14 fluid mechanics course, the Defendant
15 responded, oh, fluid mechanics, that will
16 be even easier to pass. I know everyone
17 on that floor.

18 So that's an example of the type of
19 deception that the Court heard in
20 evidence -- the Court saw the evidence of
21 that the Defendant was engaged in
22 separate and apart from his career or his
23 job with the MSS.

24 One of the other striking pieces of
25 character evidence I think we mentioned

1 in our sentencing memo, which shouldn't
2 be forgotten here today, is that when the
3 Defendant traveled to Belgium for a
4 meeting with Dr. Zheng, let's not forget
5 that he had personal photos of
6 Dr. Zheng's family and his child with
7 him. And he also had approximately
8 \$7,000 in cash. Either to bribe or maybe
9 extort pressure on Dr. Zheng to cooperate
10 with him.

11 The history and characteristics of
12 the Defendant. One of the points the
13 Defendant made in his sentencing
14 submission to the Court was that the
15 Government here today is trying to make
16 an example of Mr. Xu, and more broadly
17 China's policies. And that is not what
18 the Court's job is here at sentencing
19 today.

20 That is not what the Government is
21 asking. What the Government is asking is
22 the Court to sentence Mr. Xu based on his
23 own individual conduct. We have outlined
24 in our sentencing memo, and the pages in
25 the sentencing memo are about Defendant

1 Xu's own conduct. All of the different
2 acts he undertook during the conspiracy.
3 His attempt to steal from GE, the Safran
4 hacking, the interactions with GE in
5 Chicago, his interactions with Arthur Gau
6 from Honeywell. These are all things
7 that Mr. Xu did, that he was personally
8 involved in and he perpetrated.

9 But I want to be clear, the Court is
10 required to consider general and specific
11 deterrents under 3553(a). It's
12 appropriate for it to consider general
13 deterrents and specific deterrents. Plus
14 the Court can give that factor as little
15 weight or as much weight as it wishes.
16 It would be error not to consider that
17 factor at all.

18 The Defendant in his sentencing memo
19 raised the Nuremberg defense and said it
20 was a consideration for the Court or was
21 a factor for the Court to consider. And
22 I would just like to remind the Court
23 there is not a shred, not a shred of
24 evidence in the record before it that the
25 Defendant was forced in any way to do any

1 of the work that we presented at trial.
2 He was a leader within the MSS
3 organization and he rose through the
4 ranks doing his work. There's no
5 evidence that he was hesitant or shy
6 about his work. And there's absolutely
7 no evidence of duress or that he was in
8 any way conflicted about the work that he
9 was doing.

10 Rather, the evidence was he eagerly
11 and aggressively pursued his potential
12 co-optees and when the risk increased, he
13 leaned in.

14 On March 30th, right before his
15 Belgium meeting with Dr. Zheng, he wrote
16 to his wife, I put a USB drive in a
17 hiding spot in eyeglass box in the middle
18 of the bookcase and it contains encrypted
19 documents. If something happens, someone
20 will come and tell you the password.

21 I will end where I started, your
22 Honor. This case is like no other across
23 the country. There is not a comparable
24 case for the Court in terms of a model to
25 look at. We cited a few cases in our

1 sentencing memorandum. Those cases
2 involve insiders. The Defendant cited a
3 few cases in his sentencing memorandum.
4 I would like to point out that those also
5 involve insiders. They mostly involve
6 defendants who have pled and accepted
7 responsibility for their conduct. And
8 the other factors we don't know from
9 these case and from the public record is
10 whether there were mitigating
11 circumstances like cooperation that
12 reduced their sentences.

13 There really is no case other in the
14 country like this one. And it might be
15 the only one in this country. Thank you,
16 your Honor.

17 THE COURT: Before I focus on this
18 Defendant, I have some questions.

19 MS. GLATFELTER: Yes, your Honor.

20 THE COURT: I want you to talk me
21 through consecutive versus concurrent,
22 briefly, the authority. I've done my
23 research and I know the answer, but I
24 want you to state it. You are asking me
25 to run the sentences back-to-back on

1 these offenses?

2 MS. GLATFELTER: Two of them, your
3 Honor.

4 THE COURT: Tell me what you are
5 asking.

6 MS. GLATFELTER: We are asking for a
7 300-month sentence. We are asking for
8 180 months on Count 1 to run consecutive
9 to Count 2. Count 2 would be 120 months,
10 which runs consecutive to Count 1.

11 We would ask the Court do the same
12 thing with Counts 3 and 4. Counts 1 and
13 2 would run concurrent to 3 and 4.

14 So the same sentence on Counts 1 and
15 2, follow the same math on Counts 3 and
16 4, and then 1 and 2 and 3 and 4 would run
17 concurrent.

18 THE COURT: But the general rule was
19 if they've been convicted of four
20 offenses arising out of same nucleus of
21 facts, you're required to run them at the
22 same time.

23 MS. GLATFELTER: That's not my
24 understanding, your Honor.

25 THE COURT: Go ahead and tell me

1 your understanding. I believe I can run
2 them consecutive, I just wanted to hear
3 your position on the authority.

4 The only time you have to merge
5 sentences and do them concurrently is
6 when the counts are multiplicitas, i.e.,
7 multiple counts criminalizing the same
8 conduct. But if each count requires some
9 proof of some fact that the other does
10 not, then they are separate crimes that
11 can be run consecutive or concurrent, at
12 the trial judge's discretion.

13 Do you think that's an accurate
14 statement of law?

15 MS. GLATFELTER: I do, your Honor,
16 and none of the counts are multiplicitas.

17 THE COURT: You don't think he was
18 conscripted into serving as a spy?

19 MS. GLATFELTER: I don't believe
20 there's any evidence of that in the
21 record.

22 THE COURT: Very well.

23 Your sentencing memo -- I don't
24 think I'm out of hand in telling him what
25 I'm telling you, it was a good sentencing

1 memoranda, helpful to the Court.

2 MS. GLATFELTER: Thank you, your
3 Honor.

4 THE COURT: Very well. Okay.
5 Mitigation from the Defense.

6 MR. MIEDEL: Thank you, your Honor.
7 Good morning.

8 THE COURT: Good morning.

9 MR. MIEDEL: There are probably few
10 things the Government and the Defense
11 agree on in this case, but I think we do
12 agree that this is an extraordinary case.

13 According to the Government, Mr. Xu
14 is a foreign intelligence officer who
15 illegally tried to acquire American
16 commercial trade secrets on behalf of his
17 country.

18 Also according to the Government,
19 this is the first time that a Chinese
20 foreign intelligence officer has ever
21 been prosecuted in a U.S. court on
22 economic espionage. The novelty of this
23 case makes this sentencing, I think,
24 different than most.

25 The usual sentencing rules, the

1 guidelines, similar cases, even the
2 statutory 3553(a) factors, don't
3 necessarily work as easily here as they
4 do in other cases.

5 THE COURT: I'd call you out on
6 that. The sentencing guidelines work,
7 they're not binding.

8 MR. MIEDEL: I know. I know they're
9 not binding. But the facts and
10 circumstances of this case are
11 sufficiently different from most other
12 cases that I think this -- that makes the
13 sentencing kind of unique.

14 In the end, in our view, your Honor,
15 the Court has to decide what kind of
16 punishment does an alleged intelligence
17 officer deserve for allegedly doing his
18 job.

19 THE COURT: Why are we still talking
20 about allegedly?

21 MR. MIEDEL: Well, your Honor,
22 Mr. Xu --

23 THE COURT: Maintains his innocence?

24 MR. MIEDEL: -- maintains his
25 innocence and is likely to appeal.

1 So for allegedly acting as directed
2 by his own Government, by his own
3 country. That is not an easy issue to
4 untangle, your Honor. I don't envy you.

5 So I agree with the Government, much
6 ink has been spilled on this case. You
7 sat through the three-month long trial.
8 I'm sure you sat thinking about the
9 sentencing for a long time --

10 THE COURT: It was three weeks.

11 MR. MIEDEL: I'm sorry.

12 THE COURT: It may have felt like
13 that.

14 MR. MIEDEL: Three-week-long trial.
15 I know you've been thinking about the
16 sentencing for a long time, so not much
17 extra needs to be said and I'm going to
18 try to be brief.

19 THE COURT: Say as much as you wish.

20 MR. MIEDEL: I'd like to start by
21 addressing just a couple of the issues
22 that were raised by the Government's
23 sentencing memoranda. First, in its memo
24 the Government makes a request for an
25 upward departure or an upward variance on

1 the basis of Mr. Xu's alleged conduct.
2 That Mr. Xu's alleged conduct somehow
3 implicated or endangered national
4 security.

5 And, your Honor, there is simply no
6 basis in our view to impose a sentence
7 above the guidelines based on a risk to
8 national security, or for you to consider
9 this as a sentencing factor. The
10 guidelines at 5K2.14 say that in order to
11 impose a national security enhancement,
12 that, quote, danger posed to public
13 safety must be substantially in excess of
14 the danger ordinarily involved in the
15 crime.

16 I think that makes sense to apply a
17 similarly rigorous standard to an upward
18 variance under 3553(a).

19 But, your Honor, you sat through
20 this trial. You heard all the evidence.
21 This case was about many things, but
22 risks to national security wasn't among
23 them.

24 This case involved the alleged
25 effort, as we know, to acquire civilian

1 aircraft jet engine technology, no more,
2 no less. I just have to refer you to the
3 testimony of the Government's own case
4 agent, FBI Agent Hull, in this case who
5 testified at page ID 3892, quote,

6 Question: In this case military
7 technology is not implicated; is that
8 correct?

9 Answer: No.

10 Nor did this case involve the theft
11 of export control material, as the
12 Government seems to suggest in a footnote
13 to its memo. According to the
14 Government's theory, the Chinese were
15 trying to acquire trade secrets to help
16 them make their own commercial jet
17 engines, not to steal those products
18 themselves.

19 So to reference the fact some of the
20 resins, for example, that were used in
21 making composite material are export
22 control is irrelevant. There is no
23 allegation whatsoever that Mr. Xu tried
24 to steal any resins.

25 Your Honor, the national security

1 angle is a red herring. It's an easy
2 mark because we're talking about spies,
3 intelligence services, and so forth. But
4 this case is and always was about
5 economic trade secrets.

6 So a national security enhancement,
7 upward variance, sentencing factor,
8 whatever you want to call it, is not
9 appropriate here.

10 Also a word about the analogous
11 similar cases that were cited by the
12 Government. As you know, we cited cases
13 to you where people received short
14 sentences for economic espionage, trade
15 secrets, those cases. The Government
16 cited two cases in its memo where people
17 received long sentences of imprisonment
18 for economic espionage.

19 Every case is different. Of course,
20 comparing these cases would be hard under
21 the best of circumstances. But, first of
22 all, I would like to note that in each of
23 the cases cited by the Government, and
24 presumably they looked for the harshest,
25 longest sentences they could find. The

1 defendants were sentenced to at least, at
2 least ten years less than what the
3 Government is asking for here.

4 More importantly, I wanted to point
5 out that in each of these cases that the
6 Government cited, the Defendant was a
7 naturalized U.S. citizen or a resident
8 who was -- who stole or attempted to
9 steal trade secrets from U.S. companies
10 that they worked for and sent to China.
11 And those defendants often were doing so
12 to line their own pockets.

13 Now, there may be reasons to
14 severely punish U.S. citizens or
15 residents who betray our country, who
16 unlawfully help other countries in
17 violation of U.S. laws and do so to
18 unjustly enrich themselves.

19 In those cases, deterrents may work.
20 It may cause U.S. citizens to think twice
21 about helping the Governments of other
22 countries. But we are dealing with here
23 a completely different situation.

24 Here Mr. Xu was convicted of trying
25 to help his own country. He was not

1 committing treason. He was not stealing
2 from his country. He was not hurting his
3 country in favor of another country. He
4 was not doing so for his own greedy
5 interest.

6 Those crucial differences, your
7 Honor, make those cases, the cases cited
8 by the Government, completely
9 incomparable.

10 Now, the Government spends much time
11 in its memo accusing China of trying to
12 steal our country's secrets, and
13 emphasizing over and over again what a
14 serious crime that is, and why that crime
15 demands a sentence usually reserved for
16 murderers and drug king pins.

17 Now, I think we can all agree that
18 trying to steal another country's secrets
19 is objectively speaking wrong. It's
20 stealing. But we cannot, your Honor,
21 divorce this situation from the reality
22 of the world.

23 You know, there is an old saying
24 about glass houses. Every country tries
25 to discover other countries' secrets.

1 Every country that has a foreign
2 intelligence service is doing precisely
3 that. That is the purpose of foreign
4 intelligence services. And our country
5 has the biggest foreign intelligence
6 service in the world.

7 I remember just a few years back a
8 big controversy about the fact that the
9 NSA was listening in to phone calls by
10 German Chancellor Angela Merkel, and that
11 was an ally, a friend of ours.

12 Are we trying to discover Chinese
13 secrets? Of course we are. So the
14 distinction is what? The distinction is
15 that China is trying to steal economic
16 secrets, obtain private proprietary
17 information from American companies?
18 Sure. That is probably something that
19 the United States is not routinely doing.

20 But as we noted in our memo, the
21 presidential directive on this says that
22 economic espionage is not okay if it's
23 intended to create an economic advantage
24 for private industry, but it is okay --

25 INTERPRETER MURPHY: Your Honor?

1 THE COURT: Yes.

2 INTERPRETER MURPHY: The interpreter
3 Robin has lost her connection with
4 Mr. Xu.

5 THE COURT: We'll pause. Are you
6 willing to pause?

7 MR. MIEDEL: I'm willing to pause.

8 INTERPRETER MURPHY: Still not
9 connected.

10 THE COURT: Very well. We're going
11 to take a recess for at least
12 ten minutes. Everybody needs a short
13 pause. We will check in ten minutes
14 whether we're up and running.

15 I appreciate your understanding.
16 The Court's in recess for ten minutes or
17 more.

18 MS. SANTORO: All rise. The Court's
19 in recess for ten minutes.

20 (A recess was taken from 11:27 to
21 11:40.)

22 THE COURT: Thank you. Please be
23 seated.

24 We're back on the record.
25 Government lawyers are here. Defense

1 team is here. The Defendant is here.

2 I'm advised that the issue with reaching
3 the Court interpreter has been resolved.

4 Ms. Murphy, can you hear me?

5 INTERPRETER MURPHY: Yes, your
6 Honor.

7 THE COURT: Can the Defendant hear
8 Ms. Murphy?

9 THE DEFENDANT: Yes.

10 THE COURT: All right. We're going
11 to proceed. Counsel was interrupted.

12 Forgive us, please.

13 MR. MIEDEL: Thank you, your Honor.

14 As I was saying, we noted in our memo
15 that the U.S. President, in his executive
16 order, said that economic espionage,
17 while it may not be okay to create an
18 economic advantage for private industry,
19 is okay if it serves the national
20 interest.

21 Now, what happens if the economic
22 interest is the national interest, as it
23 is for a communist country like China?
24 What if the efforts to acquire economic
25 secrets are national efforts orchestrated

1 by the intelligence services? By
2 definition, the efforts of a country's
3 foreign intelligence service serve that
4 country's national interest; that is the
5 real world.

6 So, sure, we can be up in arms about
7 what China is doing, but that is a
8 political matter. That is a matter for
9 international politics. We use -- our
10 country uses our political and economic
11 might to encourage other countries to
12 conform, to act in accordance with its
13 National Ordinance and we use sticks and
14 we use carrots. But we do not use the
15 criminal justice system designed to deal
16 with individual men and women who have
17 broken the law to fight our international
18 disputes. It doesn't make any sense.

19 Your Honor, I know you've had a
20 chance to read the letters that were
21 submitted to the department of probation
22 from Mr. Xu's wife and father. I think
23 they are quite remarkable letters
24 beautifully written and they serve as a
25 real window into Mr. Xu's life.

1 In her letter to the Court, Mr. Xu's
2 wife said something so simple and yet so
3 profound, she said, quote, Both my
4 husband and I are just ordinary human
5 beings.

6 And that's exactly right. Mr. Xu is
7 an ordinary human being. He is not a
8 symbol or a proxy or an example or a
9 message.

10 And Mr. Xu, the man, the ordinary
11 human being is easily lost in this case.
12 From the earliest days of this case, the
13 media reports hysterically labeled him a
14 spymaster, an agent, a spook. He's a
15 man. A man lovingly described in the
16 letters of his wife as a husband -- and
17 it's easy to forget, that he's a husband
18 whose wife desperately loves and needs
19 him. That he's a father, whose now
20 14-year-old son has been without his
21 father for some of his formative years
22 and who needs him too. That he is the
23 son of two elderly parents, one of whom
24 is quite ill, who are absolutely
25 devastated by what has happened to their

1 son, as you could tell from his father's
2 letter.

3 It's easy to forget that Mr. Xu had
4 a life in China outside of his job. That
5 he read books and played soccer with his
6 son and carried groceries for his
7 neighbors.

8 Your Honor, for the sentencing we
9 urge you not to lose sight of the
10 ordinary human being that Mr. Xu is.

11 Now, as we set forth in our memo, as
12 you know, Mr. Xu has already suffered a
13 lot in the four and a half years he's
14 been in this country. According to the
15 Government, he was a section chief at MSS
16 who supposedly spent his time recruiting
17 academics, gathering information, doing
18 research, contacting sources. He is no
19 James Bond. And yet that's how he was
20 treated.

21 After he arrived in the United
22 States, he was put into solitary
23 confinement, as you know. He was treated
24 like an escape risk. He couldn't see or
25 speak to other inmates. He couldn't

1 breathe fresh air. He got very sick with
2 COVID before there was any vaccine,
3 shivering alone in his cell thousands of
4 miles away from his family, who worried
5 that their loved one was going to perish
6 in his cell in the United States.

7 He was treated like a terrorist or a
8 mass murderer that the DOD keeps in super
9 max in Colorado. Why? Even according to
10 the Government, he was primarily a paper
11 pusher.

12 And yet, despite these indignities,
13 despite the harshness of these
14 conditions, Mr. Xu has been a model
15 inmate. He has never lashed out. He has
16 never disrespected his guards. He's
17 never been written up for even the
18 slightest infraction.

19 He has handled this situation, this
20 very, very difficult situation with
21 remarkable grace. So we ask your Honor
22 to take those circumstances into account
23 too in fashioning the appropriate
24 sentence.

25 Your Honor, I want to end with this,

1 as you have pointed out many times, I'm
2 from New York and don't really practice
3 in this jurisdiction. In fact, today may
4 be the last time that I ever appear in
5 front of you, so I just want to take the
6 opportunity to say that it's been a
7 pleasure appearing in your courtroom.

8 You are a fair and reasonable judge
9 and I expect you will apply that fairness
10 and reasonableness to Mr. Xu. And in
11 light of all the circumstance in this
12 case, Mr. Xu is a person, in light of the
13 motivations that brought him before you,
14 we think a fair and reasonable sentence
15 is the 55 months or so he already served
16 under such harsh, such brutal conditions.
17 It's enough. It's enough to accomplish
18 the goal of sentencing.

19 We also join in the probation
20 department in recommending no fine in
21 this case is appropriate.

22 Your Honor, if Mr. Xu is what the
23 Government says he is, then like those
24 Chinese intelligence officers who tried
25 to infiltrate an American military base

1 that we talked about in our memo, or the
2 Russian sleeper agent that got arrested
3 in New York -- in New Jersey ten years
4 ago, Mr. Xu should be sent home.

5 The United States can fight its
6 economic war with China if it so chooses,
7 but it shouldn't do so in this courtroom.

8 Thank you.

9 THE COURT: Thanks. The Court has
10 appreciated your professionalism.

11 MR. MIEDEL: Thank you.

12 THE COURT: The Defendant wishes to
13 have his statement to me read by the
14 interpreter in English to me at this
15 time; is that right?

16 MR. MIEDEL: Yes, your Honor.

17 THE COURT: Please proceed.

18 THE DEFENDANT: (Reading in
19 Chinese.)

20 INTERPRETER HARMON: I have
21 received --

22 THE COURT: Can I interrupt a
23 minute? Is that the entirety of the
24 statement or he is just pausing?

25 MR. MIEDEL: I think he's pausing.

1 INTERPRETER HARMON: He is pausing,
2 so that -- we made arrangements he will
3 read by paragraph and I will interpret --

4 THE COURT: Very well.

5 INTERPRETER HARMON: -- consecutive.

6 I have received extraordinarily
7 harsh treatment due to my 49 months in
8 the America prison facility. The worst
9 examples of the harshness and brutality
10 of my confinement conditions are provided
11 in the Defendant's sentencing memo.

12 The actual inflicted sufferings I
13 have experienced have been far beyond
14 what is being told. Personnel with the
15 DOD authorities indicate to me on more
16 than one occasion that they only treat me
17 that way because they were following
18 orders from multiple agencies in the
19 upper level of the federal government.

20 I did not know who those agencies
21 were until I gained access to a meeting
22 note that they included not only the
23 Federal intelligence agency, the National
24 Security Division, NSD, of the DOJ, but
25 also the FBI.

1 I've been prosecuted and charged by
2 the NSD through the court system, but
3 also being persecuted in the prison at
4 the same time.

5 THE DEFENDANT: (Reading in
6 Chinese.)

7 INTERPRETER HARMON: Besides being
8 mistreated, back in the end of 2019, a
9 supervisor in the prosecutor's office
10 once tell my attorney with confidence
11 that my case would never go to trial. At
12 the time, and through my attorney, he was
13 making an effort to solicit a cooperation
14 deal between me and the U.S. government.

15 To me, this assertion that there
16 would be no trial felt intimidating,
17 implying if I did not cooperate, I would
18 die in prison.

19 THE DEFENDANT: (Reading in
20 Chinese.)

21 INTERPRETER HARMON: The
22 above-referenced leaking note was the
23 product of another solicitation for a
24 plea deal conducted between the
25 prosecution and one of my attorneys last

1 February.

2 I've lost count of how many times
3 those attempts been made. I do, however,
4 remember clearly that every time they
5 made the attempt, they would also mention
6 my family and scare to me that I better
7 cooperate with the U.S. Government or
8 else. These felt like an extremely
9 shameless act. When I could no longer
10 tolerate it, I sent the prosecutor a
11 legal letter so that they would cease
12 that kind of harassment and intimidation.

13 Because of this, my family members
14 are too frightened to visit me from China
15 for fear of their own personal safety.
16 That has result in me and my family being
17 alienated for the last four plus years.

18 THE DEFENDANT: (Reading in
19 Chinese.)

20 INTERPRETER HARMON: Every time that
21 the Government approached me, it was
22 presented to me that should I choose to
23 cooperate, I would be set free or just
24 shorter imprison and be award big money.
25 Otherwise, I would be locked up for 20 to

1 30 years.

2 All of this took place within the
3 grand context of the trade war between
4 U.S. and China. All the U.S. government
5 has done is to use the legal system as a
6 weapon in the war it wages to further its
7 political agenda. That has nothing to do
8 with respect and justice.

9 THE DEFENDANT: (Reading in
10 Chinese.)

11 INTERPRETER HARMON: Your Honor,
12 today I just want to tell you a little
13 bit about something that happened behind
14 the scene. Nevertheless, I am just an
15 ordinary Chinese citizen who knows
16 nothing about politics. Neither I know
17 anything about secrets. I have never
18 figure out what value, if any, I might
19 contribute to the U.S. government if
20 cooperation did come into play.

21 Why on earth did I got caught into
22 this incredible legal battle.

23 THE DEFENDANT: (Reading in
24 Chinese.)

25 INTERPRETER HARMON: During this

1 last four years where high-ranking
2 officials from the U.S. government have
3 cite my case at all kinds of political
4 events, they exaggerate facts from it,
5 and make it into a political event.

6 In fact, the trial itself could have
7 proved my innocence. It showed that I
8 never made any request from anyone for
9 any trade secret.

10 Conversely, my attorneys have
11 discovered from the White House website
12 that the American President Joe Biden
13 signed an executive order on
14 October 7, 2022, that the U.S. government
15 is collecting trade secrets from foreign
16 countries.

17 Thus, this whole case is merely a
18 political farce directed and acted out by
19 the U.S. government for
20 self-aggrandizement. It is like the
21 thief who demands that the thief be
22 caught.

23 THE DEFENDANT: (Reading in
24 Chinese.)

25 INTERPRETER HARMON: Regardless what

1 the sentence may be, I will appeal this
2 case because I stand by my innocence.
3 Thank you.

4 THE COURT: Sir, I'm glad you had
5 the chance to make that statement to me.
6 You and I, we never talk.

7 THE DEFENDANT: Thank you.

8 THE COURT: I listened carefully.
9 Is there further mitigation from the
10 Defense?

11 MR. MIEDEL: No, your Honor.

12 THE COURT: Does the Government feel
13 compelled to reply?

14 MS. GLATFELTER: Only in response to
15 a question posed to me by the Court. The
16 Court asked me what authority there is
17 for consecutive sentences.

18 I want to direct the Court to
19 Garrett, which is a Supreme Court case
20 471 U.S. 773, which says the presumption
21 is when Congress creates two distinct
22 offenses, is that it intends to prevent
23 cumulative sentences.

24 I'd also direct the Court to the
25 sentencing guidelines, which of course,

1 are advisory, but it contemplates this
2 situation in 5G1.2(d) which says that, If
3 the sentence imposed on the count
4 carrying the highest statutory maximum is
5 less than the total punishment, then the
6 sentence imposed on one or more of the
7 other counts shall run consecutively, but
8 only to the extent necessary to produce a
9 combined sentence equal to the total
10 punishment. In all other respects,
11 sentences on all counts shall run
12 concurrently, except otherwise required
13 by law.

14 I just wanted to provide the Court
15 that authority.

16 THE COURT: The Court has that
17 authority. We've done our full-blown
18 research on every issue presented. I
19 didn't see a lot of citations in your
20 memo, and I thought I would get your
21 help. I would refer you to the
22 Blockburger case, which holds the same
23 thing out of the Supreme Court.

24 Does the Government wish to be heard
25 further?

1 MS. GLATFELTER: No, thank you, Your
2 Honor. I apologize for not including
3 those cites in our brief.

4 THE COURT: Very well. The last
5 word from the Defense?

6 MR. MIEDEL: Nothing else, your
7 Honor. Thank you.

8 THE COURT: Very well. My turn to
9 talk.

10 I'm focused on this human being,
11 whom I called Mr. Xu, who is the
12 Defendant in this case and was convicted
13 beyond a reasonable doubt on four counts
14 of felonies.

15 I've listened carefully to his
16 statement. My focus is on his acts, his
17 own individual conduct, and this is not
18 an attempt to send a message to China.

19 I've been a judge for more than
20 25 years. I know what my
21 responsibilities are. And my
22 responsibility is to determine what
23 sentence is sufficient, but not greater
24 than necessary to accomplish the purposes
25 of sentencing.

1 And I told you the factors I have to
2 consider. The first is the nature and
3 circumstances of the offense. As the
4 Government correctly points out, the
5 scope of the espionage perpetrated by
6 this human being was enormous. It wasn't
7 a one-shot hit.

8 The nature and the circumstances of
9 the offense are extraordinarily harmful
10 to the Defendant at sentencing. As to
11 the nature and circumstance of the
12 offense, or perhaps his history and
13 characteristics, I need to recognize you
14 are a citizen of the People's Republic of
15 China. The loyalty that we have for the
16 United States is the same loyalty that
17 you have for China.

18 I also need to acknowledge that the
19 dynamic of the Chinese government with
20 its citizens is very different than the
21 United States. But at the end of the
22 day, you were a spy for the Chinese
23 government trying to steal America's most
24 valuable aviation secrets.

25 You tried to steal the property of

1 foreign companies knowing full well the
2 damage it would cause the businesses and
3 the countries.

4 The nature and circumstances of the
5 offense don't help you. I know you are a
6 young man. I know you are in a foreign
7 country far from home, away from your
8 family.

9 I received letters in support. They
10 were extraordinary letters from your
11 father and your wife. They love and
12 support you very much. Not in the terms
13 of the offense, but in terms of who you
14 are as a human being. They speak of your
15 charitable nature, of your love for your
16 family, your care for your community. I
17 am not blind to the human impact.

18 Criminal sentencing is the most
19 difficult responsibility, I believe, that
20 anybody can undertake, and I undertake it
21 freely. And I seek to do what is fair
22 and just.

23 The question here is what sentence
24 is sufficient, but not greater than
25 necessary. I have to reflect the

1 seriousness of the offense, promote
2 respect for the law. The offense is
3 serious. The sentence needs to reflect
4 that. It needs to reflect the scale and
5 scope of the offense. Here the scale and
6 the scope was extraordinary.

7 I have to consider adequate
8 deterrents. My sentence needs to deter
9 you. You are a young man. You will be
10 released from prison at some point. When
11 you return to China, I need to ensure
12 that the sentence I impose today deters
13 you from going home and picking it up
14 again.

15 I also have to consider general
16 deterrents. The Defense says whatever I
17 sentence is not going to deter a whole
18 country, that is true in a sense, but I
19 don't need to deter every human being in
20 China. It's sufficient for the sentence
21 to cause others pause.

22 Moreover, the deterrence does not
23 need to be specific to China. My
24 sentence today will also deter others,
25 even those in the United States, from

1 engaging in this conduct.

2 I need to protect the public from
3 further crimes from you, that's similar
4 to specific deterrence. Same thing.
5 What is the likelihood you're going to
6 pick up where you left off when you
7 return?

8 My sentence today needs to minimize
9 that risk to the extent possible. And so
10 I'm called upon to determine the most
11 appropriate correctional treatment in the
12 most effective manner.

13 I told you I have to consider the
14 sentences I have available. I could send
15 you to prison on each offense up to the
16 statutory maximum. The guidelines
17 recommend 210 to 262 months, 17 to
18 22 years.

19 The Government is asking for
20 300 months, 25 years, above the
21 guidelines.

22 And your attorneys are asking for
23 time served.

24 In assessing the 3553(a) factors, I
25 need to ensure that the aggregate term of

1 imprisonment is appropriate to reflect
2 the nature of the offense. That means I
3 could give you the statutory maximum on
4 all counts, but I still need to consider
5 whether those sentences should be run the
6 same or back-to-back.

7 The law puts in my discretion
8 whether to run them at the same time or
9 back-to-back or partially back-to-back.
10 The only time they merge entirely and
11 must be run at the same time is if there
12 are multiple counts criminalizing the
13 same conduct; that is not here because
14 here each count requires proof of some
15 fact that the other does not. They are
16 separate crimes. They run back-to-back
17 or not at my discretion.

18 What I need to be certain is that my
19 consideration of the 3553(a) factors
20 reflect a determination as to what
21 aggregate sentence is sufficient, but not
22 greater than necessary to accomplish the
23 purposes of sentencing.

24 Based on everything I've stated,
25 everything I'm required to consider, the

1 totality of the circumstances, I find
2 that the appropriate sentence to you is
3 180 months imprisonment on
4 Counts 1 and 3, 15 years max, running at
5 the same time. 120 months imprisonment
6 on Counts 2 and 4, concurrent to each
7 other, or a 10-year max, but 60 months of
8 it shall be run partially consecutive to
9 Counts 1 and 3.

10 So the aggregate term of my ordered
11 imprisonment is 240 months, 20 years,
12 less time served.

13 The sentence is appropriate in light
14 of my consideration of the 3553(a)
15 factors and my hard analysis, and the
16 full participation in all phases of this
17 case.

18 I stated my anticipated sentence.
19 I'm required to stop and ask if there are
20 any procedural or substantive objections
21 from either side before I docket the
22 judgment.

23 Is there any from the Government?

24 MS. GLATFELTER: No, your Honor.

25 THE COURT: From the Defense?

1 MR. MIEDEL: No, your Honor.

2 THE COURT: Very well.

3 The Court's previously articulated
4 sentence shall be docketed as the final
5 judgment. The Defendant is to be
6 remanded to the custody of the U.S.
7 marshals.

8 I'm required to advise you that you
9 have the right to appeal my sentence, if
10 you choose to. You will have to file a
11 notice of appeal within 14 days of entry
12 of the judgment in this case.

13 I'd ask your lawyers to work with
14 you on that.

15 And with that, I believe what we
16 have done today is what has been needed
17 and has been addressed fully. Is there
18 anything else I need to address before we
19 adjourn from the Government?

20 MS. GLATFELTER: No, your Honor.

21 THE COURT: From the Defense?

22 MR. MIEDEL: Yes, your Honor. We
23 would ask that you recommend to the
24 Bureau of Prisons that Mr. Xu be
25 designated to a facility as close to

1 New York as possible. The reason is
2 two-fold. One, he has been often visited
3 by members of the Chinese consulate based
4 in New York, and also it's likely his
5 appeals lawyer will be based in New York.

6 THE COURT: I'm happy to make that
7 recommendation. It's merely a
8 recommendation. The Bureau of Prisons
9 makes the decision.

10 I recommend that he be imprisoned as
11 close to New York City as his eligibility
12 permits. I heard what he said about his
13 confinement. The Court worked hard to
14 make sure that he was attended to in the
15 most appropriate manner.

16 Yes?

17 As part of my sentence, he needs to
18 pay the \$100 special assessment as to
19 each of the four counts, \$400.

20 There is no supervised release on my
21 sentence.

22 Is there something else?

23 THE CLERK: No fine.

24 THE COURT: No fine.

25 Anything else?

1 THE CLERK: No, that's it.

2 THE COURT: Godspeed. The Court
3 intends to recess.

4 MS. SANTORO: All rise. The Court
5 is now in recess.

6

7 - - -

8 HEARING ADJOURNED AT 12:12 P.M.

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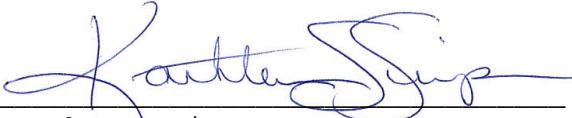
25

1 C E R T I F I C A T E

2 STATE OF OHIO :
3 : SS
4 COUNTY OF CLERMONT :

5 I, Kathy S. Simpson, RPR, the
6 undersigned, a duly qualified and commissioned notary
7 public within and for the State of Ohio, do certify
8 that the foregoing is the hearing given at said time
9 and place; and that I am neither a relative of nor
10 employee of any of the parties or their counsel, and
11 have no interest whatever in the result of the
12 action.

13 IN WITNESS WHEREOF, I hereunto set my hand
14 and official seal of office at Cincinnati, Ohio, this
15 1st day of December, 2022.

16
17 
18 Kathy S. Simpson, RPR
19 Notary Public - State of Ohio
20 My commission expires March 21, 2027
21
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23
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